SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1024

CHARLES T. RULE,

Petitioner,

vs.

HATTIE SEARS, EDWIN E. WEBER, MINNIE LOUISE MATTOCKS, MAMIE CASE, DOROTHY REUTER, VERNA HARVEY AND MINNIE B. COTTON,

Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions Below

The opinion of the District Court of Appeal on the first appeal, i.e., the appeal from the judgment of dismissal following sustaining of petitioner's demurrer, is reported in 45 Cal. App. (2d) 374, 114 Pac. (2d) 57 (R. 260-271). The opinion of the District Court of Appeal on appeal from the judgment on the merits, vacated by hearing granted by the Supreme Court of California, is found in 65 A. C. A. 821,[1] 151 Pac. (2d) 293 (R. 271-280).

[1] Advance California Appellate Opinions.

The opinion of the Supreme Court on the decision sought to be reviewed here is reported in 27 A. C. 131 [2] and 163 Pac. (2d) 443 (R. 296-313).

II

Jurisdiction

The basis of jurisdiction is given under heading "B" in the petition for writ of certiorari (*ante*, p. 7), and in the interest of brevity is incorporated here by reference.

III

Statement of the Case

A summary statement of the case appears under the heading "A" in the petition for writ of certiorari (*ante* p. 2), and in the interest of brevity is incorporated here by reference. Amplification of the statement appears in the course of argument.

IV

Specification of Errors

The Supreme Court of California erred:

1. In affirming the judgment of the trial court upon the theory of a cause of action evolved by the Supreme Court itself, which was not presented or relied on in the trial court or on appeal, and which has never been the subject of judicial inquiry or determination, thereby substantially depriving petitioner of his day in court and denying him the due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

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[2] Advance California Opinions.

2. In arbitrarily, and in disregard of the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution, depriving petitioner of the property vested in him by the final decree of distribution of the probate court, and giving said property to persons not claiming to be beneficiaries of the purported trust created by an agreement collateral to the will (declared by the Supreme Court to be the basis of its decision) without judicial inquiry into and determination of the validity, or the purposes, terms and beneficiaries of such purported agreement or trust.

V

Summary of the Argument

Point 1. The action of the California Supreme Court in discarding the theory and cause of action presented and relied on in the trial court and on appeal, and substituting a new and different theory and cause of action, which has never been the subject of judicial inquiry or determination, substantially denies petitioner his day in court, condemns him without an opportunity to be heard, and denies him due process of law and the equal protection of the laws.

Point 2. Even assuming the right of the California Supreme Court to discard the theory and cause of action presented and relied on in the trial court and on appeal, its action arbitrarily and without due process of law deprives petitioner of the property vested in him by the final decree of distribution of the probate court by giving said property to respondents who do not claim to be beneficiaries under any purported collateral agreement (declared by said court to be the basis of its decision) without any judicial inquiry into or determination of the validity, or the purposes, terms and beneficiaries of such purported agreement or any trust resulting therefrom.

VI

Argument

Point 1

The action of the California Supreme Court in discarding the theory and cause of action presented and relied on in the trial court and on appeal, and substituting a new and different theory and cause of action which has never been the subject of judicial inquiry or determination, substantially denies petitioner his day in court, condemns him without an opportunity to be heard, and denies him due process of law and the equal protection of the laws.

It is elementary that the decree of distribution of the probate court, having become final, was conclusive as to the rights of all heirs, devisees and legatees, as to the interpretation of Mrs. Weber's will, and to the propriety of distribution of the entire estate to petitioner in his individual right. Right or wrong, the decree was final and conclusive upon the world.[3] It could not be collaterally attacked except for extrinsic fraud or jurisdictional defects. The respondents elected to launch a collateral attack on the ground of extrinsic fraud.

As pointed out by the Summary Statement (*ante* p. 2), respondents by the pleadings predicated their right of recovery upon (1) alleged error of the probate court in construing the will and in distributing the estate to petitioner (R. 148); and (2) alleged extrinsic fraud of petitioner in inducing the decree of distribution (R. 149-153). The District Court of Appeal so construed the second amended complaint on appeal from the judgment of dismissal following sustaining of petitioner's demurrer,

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[3] *Cook* v. *Cook*, 17 Cal. (2d) 639.

the first appeal in the case (R. 260-271). The pleadings were so construed and relied upon by the trial court. The foundation of the cause of action presented, relied on and acted on by it, is thus stated in paragraph V of the trial court's conclusions of law (R. 235), which follow the allegations of paragraph VII of the complaint (R. 148) and of paragraph VI of the cross-complaint (R. 184-185):

> "Article Five of the will of Sarah E. Weber attempted to devise and bequeath the residue of her estate to Charles T. Rule in trust, but said will did not name the object or purpose of said attempted trust, or identify the beneficiaries thereof, and said attempted devise and bequest in trust failed, and said residue became and was intestate property and should have been distributed by the Probate Court to plaintiffs, defendants and cross-complainants herein according to the laws of intestate succession of the State of California, and should not have been distributed by said court to said Charles T. Rule as his property."

That fundamental issue and its necessary concomitant, the issue of extrinsic fraud, were read out of the case by the California Supreme Court. It substituted, as a basis for its decision, a new theory or cause of action predicated upon an express trust created by an agreement collateral to the will, thus introducing a ground or issue that petitioner had not been called upon to meet, and which was not the subject of judicial inquiry or determination in the court below.

(a) *It is a fundamental rule, universally recognized and applied, that the theory and cause of action presented and relied upon in the court below must be strictly adhered to on appeal.*

Virginia v. *Mullens*, 271 U. S. 220;
Lutcher & Moore Lumber Co. v. *Knight*, 217 U. S. 257;
Ernst v. *Searle*, 218 Cal. 233;

Gibson Properties Co. v. *City of Oakland*, 12 Cal. (2d) 291;

Papinau v. *Security-First National Bank*, 6 Cal. (2d) 668;

Lamberson v. *Bashore*, 178 Cal. 321;

3 Am. Jur., pp. 35 *et seq.*, citing numerous cases;

4 C. J. S., Appeal and Error, pp. 465 *et seq.*, citing numerous cases.

In *Ernst* v. *Searle*, *supra*, at pages 240, 241, the California Supreme Court declared the rule as follows:

> "The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court but manifestly unjust to the opposing litigant."

Recently the same court in *Gibson Properties Co.* v. *City of Oakland*, *supra*, at page 298, said:

> "It is well settled that the theory upon which a case was tried in the court below must be followed on appeal."

The California courts have uniformly upheld and applied the rule,[4] and the courts of other jurisdictions have recognized the rule as fundamental and firmly established.

The Supreme Court of Missouri, in *Duffley* v. *McCaskey*, 345 Mo. 550, 556, said it is "elementary law that a case must be submitted in the appellate court on the same theory upon which it was tried in the lower court." In *United States Fidelity & Guaranty Co.* v. *State*, 169 Okla. 59, 62, the Oklahoma Supreme Court declared it to be "a fundamental principle governing review" that on appeal "neither party

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[4] See California cases cited in 2 Cal. Jur. at pages 237 *et seq.*, and 1 Cal. Jur. Ten Year Supp., pp. 312, 313.

will be permitted to change the theory of his case and present it on a different theory than that upon which it was presented in the trial court." And in *Roof* v. *Rule*, 348 Ill. 370, 375, the Illinois Supreme Court said: "A complainant in a chancery suit cannot make one case by his bill in the lower court and on a review by a reviewing court be allowed to make another and entirely different one."

The following statement in *Flammer* v. *Morelli* (N. J. Ct. Err. and App.), 100 N. J. Law Rep. 314, 316, has particular application here:

> "A verdict erroneous on the theory adopted in the trial court cannot be sustained on a theory excluded in that court and which the jury had no opportunity to consider."

In line with the foregoing is the language of the United States Circuit Court of Appeals, Second Circuit, in *Osgoody* v. *Talmadge*, 45 Fed. (2d) 696, 697:

> "We must assume • • • that the complaint sets forth a cause of action for deceit inducing the making of the contract. There are two such charges. There is first the charge that defendants from the beginning had the purpose of not carrying out their promises. • • • *The judgment may not be sustained upon this charge, assuming it to state a cause of action, for no such issue was left to the jury, nor was the case tried upon this theory.* The same may be said of the second charge of fraudulent inducement. • • • Whether this was fraud we need not say. The action was tried, not on the theory of fraud in inducing the contract, but of fraud in carrying it out." (Italics ours.)

In the light of the uniformly accepted rule the judgment in the instant case cannot be sustained upon the theory evolved by the California Supreme Court, for such theory or issue was never presented by pleading, nor was the case tried, considered or determined by the trial court upon such theory or issue.

(b) *The primary and fundamental reason underlying the salutary rule of the cited cases is to prevent injustice and to insure to the litigant his day in court and an opportunity to be heard upon due notice of the charges he is required to meet.*

This was the reason recognized by this Court in *Virginia* v. *Mullens*, 271 U. S. 220, 227, 228. The Court there said:

> "The case stated in the complaint was distinctly in tort. There was no mention of a contract obligation; nor any reference to either of the two deeds. And when the court came to charge the jury, the plaintiff tendered and the court included in its charge various instructions wherein the case was treated, in keeping with the complaint, as one to recover damages for an alleged tortious creation and continuance of a nuisance. *After bringing and trying the case on that theory the plaintiff cannot be permitted on this review to change to another which the defendant was not required to meet below.*" (Italics ours.)

The primary reason for the rule was plainly declared by this Court in *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, where it said, at pages 264, 266, 267:

> "The circuit court of appeals affirmed the judgment of the trial court, and the opinion delivered by it is as follows: 'By the court: After a thorough and attentive consideration of the questions raised on this writ, we are of opinion that the matters of defense relied upon by plaintiffs in error on the trial below, in so far as they were not given consideration, were of an equitable nature, not cognizable in a court of law. We therefore affirm the judgment of the circuit court' * * *.
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> "The decision of the question before us is controlled by the case of *Burbank* vs. *Bigelow*, 154 U. S. 558, Appx and 19 L. Ed. 51. That was an action at law in which the plaintiff recovered judgment. In this court, for the

first time, the objection was made by the unsuccessful party that the matter of the demand of plaintiff was one of equitable cognizance. The court, however, said: 'The objection that the matter of plaintiff's demand is one of equitable cognizance in the Federal Courts cannot prevail. No such objection was raised in the court below at any stage of the proceedings, and it cannot be permitted to a defendant to go to trial before a jury on the facts of a case involving fraud, and let it proceed to judgment on the verdict without any attempt to assert the equitable character of the suit, and then raise that question for the first time in this court.'

"Applying this doctrine to the facts and circumstances which we have previously stated, we are of opinion that it inevitably results that the effect of the action of the circuit court of appeals was substantially to deny to the plaintiffs in error in that court, the petitioners here, their day in court; in other words, was equivalent to condemning them without affording them an opportunity to be heard." (Italics ours.)

As already disclosed, the California Supreme Court, in *Ernst* v. *Searle, supra*, declared that to permit a party to change his position and adopt a new and different theory on appeal would be manifestly unjust to the opposing litigant. What the parties themselves will not be permitted to do, the appellate court may not do on its own motion,[5] for such action strikes down the fundamental right of the litigant to be heard upon due notice of the charges he is required to meet, and violates the due process of law clause in its primary and most fundamental aspect.

Reynolds v. *Stockton*, 140 U. S. 254, 268, 269;
Coe v. *Armour Fertilizer Works*, 237 U. S. 413, 425, 426;
Standard Oil Co. v *Missouri, ex rel. Hadley*, 224 U. S. 272, 282;
Windsor v. *McVeigh*, 93 U. S. 274, 282.

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[5] *Lutcher & Moore Lumber Co.* v. *Knight, supra.*

This Court said in *Truax* v. *Corrigan,* 257 U. S. 312, 332:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law,—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

And in *Brinkerhoff-Faries Trust & Savings Co.* v. *Hill,* 281 U. S. 673, this Court said, at pages 681, 682:

> "We are not now concerned with the rights of the plaintiff on the merits * * *. Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support. * * * While it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law."

(c) *The Court's refusal to adhere to and apply the long established and universally recognized and applied rule under discussion also deprives the petitioner of the equal protection of the law.*

In *Truax* v. *Corrigan, supra,* this Court said, at page 332:

> "*Our whole system of law is predicated on the general fundamental principle of equality of application of the law.* * * * But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.
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> "The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality on the

other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process. * * * *Thus the guaranty was intended to secure equality of protection not only for all, but against all similarly situated.* Indeed, protection is not protection unless it does so." (Italics ours.)

(d) *The theory and cause of action substituted by the California Supreme Court was never presented or relied on in the trial court.*

Contrary to the statement of the decision (R. 303), respondents did not plead the cause of action which the California Supreme Court makes the basis of decision. Nor, again contrary to the statement of the decision (R. Vol. 11:300), did respondents plead "that the testatrix intended to give petitioner the residue in trust only," or "that he had agreed with her to distribute the property in accordance with their previous understanding," or "that a 'secret trust' was thereby created." The pleadings disclose no such allegations (R. 144-160, 183-195).

Respondents did not rely on a secret trust or collateral agreement as the basis of their right of recovery. Nor, as the decision states (R. 300), did they "urge the existence of the agreement * * * as a part of their proof in establishing intestacy." On the contrary they pleaded and relied on an entirely different basis of recovery. Their pleadings disclose that they relied on the terms of the will itself to establish intestacy (complaint, paragraph VII, R. 148; cross-complaint, paragraph VI, R. 184-185), and on their charges of extrinsic fraud to permit correction of the alleged error of the probate court in construing the will and distributing the estate (R. 149-153, 187-191).

In the trial court the inquiry as to any understanding between Mrs. Weber and petitioner concerning her intentions with respect to her estate was restricted, and evidence along those lines was only admitted, in the language of

the trial court, "because of the issue * * * as to whether there was any conscious fraud" (R. 110, lines —; see also 6).

On appeal, again, the matter of an agreement or understanding between petitioner and his sister has been urged only with reference to the issue of extrinsic fraud.[6] Petitioner's position on appeal has been, first, that the evidence disclosed no understanding or agreement which could have been concealed from the probate court; and, second, that if any agreement did exist, it was not a matter with which the probate court was concerned, and consequently the purported agreement afforded no basis for extrinsic fraud.[7]

What petitioner has outlined above under this subdivision is admittedly correct, for the decision admits that the theory upon which the California Supreme Court affirmed the judgment is not "identical" with that "relied upon by plaintiffs or the trial court" (R. 303).

Clearly, the California court pursued an arbitrary and unprecedented course in substituting for the purposes of its decision an entirely new theory and cause of action which was never presented, relied on or acted on in the trial court. The language of the Circuit Court of Appeals for the Eighth Circuit in *Atlantic Brewing Co.* v. *Grocery Co.*, 79 Fed. (2d) 45, at 47, is particularly applicable. That court said, in part:

> "By their pleadings and their actions during the trial the parties to an action create the issues which they are permitted to present upon appeal. Those issues must be clearly presented to the trial court or

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[6] Copies of the briefs before the California Supreme Court have been filed with the Clerk, marked "Volume 10." The points raised on appeal by petitioner are indicated at pages 11-13 of Appellant's Opening Brief; the position of respondent Cotton is stated at pages 2 and 3 of Cross-Complainant's and Respondent's Reply Brief; and the other respondents stated their position at page 3 of Plaintiffs' Reply Brief.

[7] The correctness of this second contention is conceded by the opinion of the Supreme Court, and is full answer to any claim of fraud upon the probate court (R. 302).

> they are (barring jurisdictional matters) deemed waived. * * *. It is unfair to the orderly administration of justice—as affecting the other party to the suit, litigants having other cases before the court, and the courts as agencies of justice—to permit any other procedure. *To do otherwise would open wide the door to trickery, imposition and unfair harassment of litigants and courts.* * * *." (Italics ours.)

POINT 2

Even assuming the right of the California Supreme Court to discard the theory and cause of action presented and relied on in the court below and on appeal, still its decision arbitrarily and without due process of law deprives petitioner of the property vested in him by the final decree of distribution of the probate court, by giving said property to persons not claiming to be beneficiaries under the purported collateral agreement (declared by said court to be the basis of its decision) without any judicial inquiry into or determination of the validity, or the purposes, terms and beneficiaries of such purported agreement or any trust resulting therefrom.

For the purpose of its decision the California Supreme Court discarded respondents' cause of action based on alleged extrinsic fraud. It supplanted that cause of action with one predicated upon an express trust presumed to have resulted from an agreement between petitioner and his sister, collateral to her will, that he would take the residue of her estate in trust.

To construct a basis for its adopted theory and cause of action the California court isolated and seized upon a finding made by the trial court in support of the charge of extrinsic fraud, i. e., that petitioner knew that his sister intended to leave him the residue of the estate "in trust only" for the beneficiaries previously agreed upon and understood between herself and Charles T. Rule" (R.

219). A component part of that finding, namely, that petitioner concealed this knowledge from the probate court, and thereby perpetrated a fraud upon the court and upon plaintiffs (R. 219-221), was ignored by the Supreme Court. Making use of the part seized upon as the basis for its action, it held that "under these facts a constructive trust arose when the property was distributed to defendant by the probate court." It pointed out that such a trust is enforced without collateral attack on the probate decree, and ruled out of consideration the two basic elements of the trial court's decision (R. Vol. 11: 227).

In doing so the California court was confronted with the fact that the trial court had made no findings as to the terms, purposes or beneficiaries of any such collateral agreement, or any trust based thereon, and had made no judicial inquiry into or determination of their validity. The failure of the trial court to make such findings or determination was, of course, due to the fact that it was not confronted with such issues. In this situation, orderly procedure and a due regard for private rights required a judicial determination of these facts before proceeding further upon the substituted theory. The California court, however, declared it was not "concerned with the rights" of the intended beneficiaries, and while itself declaring no invalidity in the purported agreement or any trust based thereon, proceeded to award the property to the heirs of the decedent "in order to prevent unjust enrichment" of petitioner (R. 303).

This was done despite the declaration of the court that respondents "do not claim to be beneficiaries" under any purported agreement, or any trust created thereby. In other words, not only did they not predicate their action on any collateral agreement, but they are strangers to one if it existed.

It is not disputed that where property is devised to one upon his agreement to apply it for another, equity will impress a trust for the intended beneficiary, if necessary. This is the rule of the cases cited in the decision of the California court (R. 302).

The rule affords no support for the court's action since respondents admittedly are not third party beneficiaries of any agreement or trust. Nor can the award of the property to respondents be justified because they are heirs-at-law, for the court declares no invalidity in the purported agreement or any trust based thereon, and no judicial inquiry or determination as to their validity was made by the trial court.

Absent requisite judicial inquiry and determination as to the terms of the purported agreement, as to its validity and the validity of any trust thereunder, the California Supreme Court had no basis upon which to declare the rights either of petitioner or respondents in the property in controversy. Without such determination it had no basis for its conclusion that petitioner was "unjustly enriched." Even on its substituted theory and cause of action it acted without that "informed, independent judgment" that due process of law demands.[8] Affirmance of the judgment against petitioner under such circumstances constitutes mere judicial confiscation of the property vested in him by the final decree of the probate court. It involves substantial denial of due process of law.[9] Without inquiry into and a judicial determination of the invalidity of the purported agreement or any trust thereunder respondents are patently without interest in the property in

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[8] cf. *Consolidated Rock Products Co.* v. *du Bois,* 312 U. S. 510, 520; *National Surety Co.* v. *Coriell,* 289 U. S. 426, 436.

[9] cf. *Railroad Retirement Board et al.* v. *Alton Railroad Co. et al.,* 295 U. S. 330, 357; *Louisville Joint Stock Bank* v. *Radford,* 174 U. S. 674.

controversy. Without such determination they have no standing in a court of equity.[10]

The money judgments must meet the same condemnation, for they represent only respondents' purported interest in property disposed of by petitioner.

The primary purpose of the due process of law guaranty is the security of the individual from the arbitrary exercise of the powers of government.[11] The principle underlying this guaranty was originally designed to secure the subject against the arbitrary action of the Crown and antedates Magna Charta, as pointed out by this Court in *Ochoa* v. *Hernandez y Morales*, 230 U. S. 139. In that case this Court said further, at page 161:

> "Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. * * * *Whatever else may be uncertain about the definition of the term 'due process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to the settled usages and modes of procedure, and without notice or an opportunity for a hearing.*" (Italics ours.)

In *Barbier* v. *Connolly*, 113 U. S. 28, 31, this Court said that the due process clause of the Fourteenth Amendment undoubtedly intended that there should be no "arbitrary spoliation of property."

To summarize, there was here an "arbitrary spoliation of property" and the arbitrary "taking of one man's property and giving it to another, contrary to the settled usages and modes of procedure." As pointed out, the decree of

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[10] In *Swallow* v. *Tungsten Products Co.*, 205 Cal. 207, 217, the Supreme Court of California said: "It is essential that a party complaining in equity should have some present substantial interest in the subject matter of the suit. He must have a direct interest in the result of the litigation, and his complaint must clearly indicate that fact."

[11] *Hurtado* v. *California*, 110 U. S. 516.

distribution of the probate court had become final and conclusive and petitioner's rights thereunder were vested property rights. Under settled usages and modes of procedure he could lawfully be deprived of these rights only:

1. Upon a judicial determination that the decree was erroneous, and that there were jurisdictional defects or that the decree was procured through extrinsic fraud;[12] or

2. Without an attack upon the decree, and proceeding upon the theory that there was a trust created by collateral agreement:

(a) At the instance of persons claiming to be beneficiaries thereof upon a judicial determination that they were such beneficiaries; or

(b) At the instance of the heirs of the decedent upon a judicial determination that such trust created by collateral agreement was invalid.

Here the cause of action pleaded under paragraph 1 above was ruled out of consideration. Paragraph 2(a) has no application because plaintiffs neither claimed nor were found to be beneficiaries of such a trust. And there was not, under paragraph 2(b), any judicial inquiry into or determination of the invalidity of any trust created by collateral agreement.

There was, of course, under the cause of action presented by the pleadings, judicial inquiry into and determination of the invalidity of the trust which the trial court found Mrs. Weber attempted to create by ARTICLE FIVE of the will, independent of the existence of a collateral agreement, but the effect of this was merely to hold that the probate court had erred in making its distribution of the residue. As to this, however, the decree remains final and conclusive

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[12] *Cook* v. *Cook*, *supra*.

in the absence of any final determination that the decree was procured through extrinsic fraud.

Assuming that there was here, by virtue of paragraph VI of the trial court's findings (R. 214), based on evidence admitted only for the purpose of giving support to the claim of extrinsic fraud, a determination of the existence of a trust created by collateral agreement, nevertheless, there was lacking judicial inquiry into and determination of the other essential element, to-wit: the invalidity of the trust created by the purported agreement, which, of course, required inquiry into and a determination of its terms and purposes.

In *American Railway Exp. Co.* v. *Kentucky*, 273 U. S. 269, this Court said, at page 273:

> "We cannot interfere unless the judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.' "

The converse is equally true. Again we quote the fundamental rule declared by this Court in *Truax* v. *Corrigan*, *supra*, at page 332:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

The procedure of the California Supreme Court violates the Fourteenth Amendment in the respects discussed under both Point 1 and Point 2.

Petitioner closes with the following apt language of this Court in *Powell* v. *Alabama*, 287 U. S. 45, 67:

> "It has never been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirements of due process of law. * * * In Holden vs. Hardy, 169 U. S. 366, 389, 42 L. ed. 780, 790, 18 S. Ct. 383, the necessity of due notice and an opportunity to be heard is described as among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' And Mr. Justice Field, in an earlier case, Galpin vs. Page, 18 Wall 350, 368, 369, 21 L. ed. 959, 963, 964, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' "

Conclusion

WHEREFORE, it is respectfully submitted that the petition for writ of certiorari should be granted.

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